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No. 981360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES MONTIONE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prisoner's timely filing of pretrial motions renders him "unable to stand trial" for the purposes of Article VI(a) of the Interstate Agreement on Detainers Act, thereby tolling the running of the statutory time limitations set forth in Articles III and IV of the Detainers Act, as to which the courts of appeal and various state appellate courts are in conflict.

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The opinion of the Supreme Court of Pennsylvania (App., *infra*, 1a-16a) is reported at 720 A.2d 738 (Pa. 1998). The opinion of the Superior Court of Pennsylvania (App., *infra*, 17a-25a) is reported at 673 A.2d 923 (Pa. Super. Ct. 1996). The opinion of the Court of Common Pleas of Lackawanna County, Pennsylvania (App., *infra*, 26a-31a) is reported at 96 Lackawanna Jurist 1 (1995).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 24, 1998, (App. A, *infra*, 7a), and this Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

This case involves the Interstate Agreement on Detainers Act (hereinafter IAD). The IAD is a congressionally sanctioned interstate compact within the Compact Clause of the United States Constitution. The federal version of the IAD is codified at 18 U.S.C.A. App. 2, § 2. The pertinent text of the IAD is set forth in the Appendix, *infra*, at 32a-41a.

STATEMENT OF THE CASE

The issue in this case is whether a prisoner's timely filing of pretrial motions renders him "unable to stand trial" for the purposes of Article VI(a) of the Interstate Agreement on Detainers Act, thereby tolling the running of the statutory time limitations set forth in the IAD.

The IAD is a congressionally sanctioned interstate compact within the Compact Clause of the United States Constitution. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). The United States, forty-eight states[1], the District of Columbia, Puerto Rico and the Virgin Islands are parties to the compact. *Carchman v. Nash*, 473 U.S. 716 (1985). The IAD establishes procedures for the transfer of prisoners incarcerated in one jurisdiction to the custody of another jurisdiction which has lodged a detainer[2] against a prisoner in order to try him or her on criminal charges.

As stated in the opinion of the Pennsylvania Superior Court, the procedural history of this case is undisputed (App., *infra*, 17a). On December 23, 1993, the District Attorney of Lackawanna County, Pennsylvania, pursuant to Article IV(a) of the IAD, filed a Request for Temporary Custody of the Petitioner, Charles Montione, who was then serving a 168-month sentence in the United States Penitentiary at Lewisburg, Pennsylvania, following his conviction on federal drug charges. The district attorney sought to try Mr. Montione on a charge of first degree murder as an accomplice, as well as on other charges. In the aforesaid Request for Temporary Custody pursuant to the IAD, the district attorney acknowledged that he proposed to bring Mr. Montione to trial within the time

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1. Louisiana and Mississippi are the only states which have not enacted the IAD.

2. In *Carchman v. Nash*, the Supreme Court defined a "detainer" as

> a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.

473 U.S. at 719.

specified in Article IV(c) of the IAD, which time limit is 120 days. A detainer pursuant to the IAD was then filed against Mr. Montione on December 23, 1993.

On February 4, 1994, Mr. Montione was transferred from federal custody and was placed into the custody of the Commonwealth of Pennsylvania pursuant to Article IV(a) of the IAD. A preliminary hearing was held on that day, after which Mr. Montione was held for trial on all charges. Mr. Montione was arraigned on February 15, 1994, and on February 17, 1994, the Commonwealth of Pennsylvania filed a motion to consolidate Mr. Montione's case with that of the principal in the murder. A hearing on the consolidation motion was scheduled for March 24, 1994, and then continued without objection until April 28, 1994. On March 17, 1994, Mr. Montione timely filed an Omnibus Pretrial Motion which included motions to quash the information, to suppress statements, and to appoint an investigator. The Commonwealth answered Mr. Montione's motion on March 21, 1994.

In early July of 1994, Mr. Montione wrote two letters to the trial judge. The first letter stated that he was ready for trial and the second letter advised the court of the applicability of the IAD. On September 1, 1994, Mr. Montione filed a motion to dismiss the charges on grounds that the Commonwealth had violated the terms of the IAD by failing to bring him to trial within the 120-day time limitation set forth in Article IV(c) of the IAD, which 120-day period had begun to run on February 4, 1994, the date upon which Mr. Montione was transferred from federal to state custody.[3] On July 27, 1994, and September 22, 1994, the trial court entered orders finding Mr. Montione "unable to stand trial," as his motion to quash was still

3. Pursuant to Article V(c) of the IAD, the remedy for a violation of the statutory time limitations of the IAD is the dismissal of the pending criminal action, with prejudice.

outstanding. On October 14, 1994, the trial court granted the Commonwealth's motion to consolidate, denied Mr. Montione's omnibus pretrial motion, and scheduled trial for November 17, 1994. The trial date was rescheduled, however, and a hearing and argument on Mr. Montione's Motion to Dismiss Pursuant to the IAD was held on December 12, 1994. On December 20, 1994, the trial court, in a written opinion, denied Mr. Montione's Motion to Dismiss. Trial commenced on January 6, 1995, well beyond 120 days from the date on which the Commonwealth obtained custody of Mr. Montione (*i.e.*, February 4, 1994). At the conclusion of the trial, Mr. Montione was convicted on all charges and sentenced to life in prison, plus five to ten years. Mr. Montione was thereafter returned to federal custody to serve the balance of his federal sentence, and he remains in federal custody to date.

A. How The Federal Question Was Presented

The federal question sought to be reviewed in this case, that is, whether a prisoner's timely filing of pretrial motions renders him "unable to stand trial" for the purposes of the IAD, thereby tolling the running of the IAD's statutory time limitations, was first raised in Mr. Montione's "Motion to Dismiss Pursuant to the IAD", which motion was filed pre-trial with the trial court. The trial court denied Mr. Montione's Motion to Dismiss in a written opinion. (App., *infra*, 26a-31a). The trial court held that Mr. Montione's filing of pretrial motions rendered him unable to stand trial and that the IAD time limits were thus tolled by his filing of pretrial motions. The trial court reasoned that by filing his omnibus pretrial motion, Mr. Montione "explicitly consented to any delay occasioned in disposing of his motion." (App., *infra*, 30a).

The Pennsylvania appellate courts also passed upon the issue raised herein by Mr. Montione. Indeed, the question

presented herein was the sole question presented on appeal to the Pennsylvania appellate courts. The opinion of the Pennsylvania Superior Court (App., *infra*, 20a-21a) recognized the division in the federal courts regarding this issue, pointing out that the United States Courts of Appeal for the First, Second, Fourth, Seventh and Ninth Circuits have decided that a defendant's pretrial motion does toll the IAD time period, while the Fifth and Sixth Circuits have reached the opposite conclusion. The Pennsylvania Supreme Court granted allowance of appeal and exercised its discretion to hear this case. While noting that this was an issue of first impression in Pennsylvania, the Pennsylvania Supreme Court also stated that several federal jurisdictions have considered this matter, with conflicting results. The Pennsylvania Supreme Court, like the Pennsylvania Superior Court, cited decisions of the First, Second, Fourth, Seventh and Ninth Circuits, which courts, according to the Pennsylvania Supreme Court,

> have interpreted the IAD to allow for tolling of the time limitations for delays occasioned by the defendant such as the time it takes for disposition of motions filed by the defendant.

(App., *infra*, 6a). The Pennsylvania Supreme Court also cited decisions of the Fifth and Sixth Circuits, which courts "strictly construed the provisions of the IAD and applied it in a prophylactic manner in favor of the defendant." (App., *infra*, 5a). The Pennsylvania Supreme Court held that Mr. Montione's filing of pretrial motions tolled the statutory time limitations of the IAD, stating that by filing his pretrial motions, Mr. Montione "implicitly consented to allow the requisite amount of time in order to dispose of them." (App., *infra*, 7a). However, the court refused to inquire into the reasonableness of the time required to dispose of Mr. Montione's motions, which disposition time totaled approximately seven months. As such,

the Pennsylvania Supreme Court would apparently permit an extremely lengthy, if not unlimited, amount of delay following a prisoner's filing of pretrial motions.

Having exhausted his remedies in state court, the Petitioner now seeks certiorari review by this Honorable Court pursuant to its federal question jurisdiction. That the IAD is a federal law subject to federal interpretation is well settled. *Cuyler*, 449 U.S. 433. In *Cuyler*, the Court, before reaching the merits of the case, was required to decide whether the federal courts would be bound by a state's own interpretation of the IAD, or whether IAD interpretation was a "federal question". The Court concluded that because the IAD

> was intended to be a grant of consent under the Compact Clause, and because the subject matter of the . . . [IAD] . . . is an appropriate subject for congressional legislation . . . the Detainer Agreement is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law.

449 U.S at 442.

In short, the *Cuyler* Court found that the IAD was a federal law subject to federal interpretation. *Id.*; *see also United States ex rel. Esola v. Groomes*, 520 F.2d 830 (3d Cir. 1975). Accordingly, the question presented herein, which is a question of the interpretation of the IAD, is a federal question which was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS FROM UNITED STATES COURTS OF APPEAL AND WITH DECISIONS FROM OTHER STATE COURTS AND FURTHER AGGRAVATES THE EXISTING SPLIT OF AUTHORITY.

As indicated above, in making their decisions, the Pennsylvania appellate courts recognized that there was direct conflict among the circuit courts regarding the issue of whether a prisoner's filing of pretrial motions renders him "unable to stand trial," thereby tolling the timing provisions of Articles III and IV of the IAD.[4] In addition, appellate courts in various

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4. The First, Second, Fourth, Seventh, and Ninth Circuit Courts of Appeal have held that the IAD's "speedy trial" provisions may be tolled by the prisoner's filing of pretrial motions. *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Whiting*, 28 F.3d 1296 (1st Cir. 1994); *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992); *United States v. Cephas*, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Walker*, 924 F.2d 1 (1st Cir. 1991); *United States v. Dawn*, 900 F.2d 1132 (7th Cir.), *cert. denied*, 498 U.S. 949 (1990); *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989); *United States v. Taylor*, 861 F.2d 316 (1st Cir. 1988); *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Hines*, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). Conversely, however, the United States Courts of Appeal for the Fifth and Sixth Circuits have refused to find that the IAD "speedy trial" provisions are tolled when the prisoner files pretrial motions. *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993); *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

states have addressed the issue with conflicting results.[5] As this Court has previously stated, certiorari is appropriate, and indeed necessary, to resolve such conflicts in IAD interpretation. *Carchman*, 473 U.S. at 724; *Cuyler*, 449 U.S. at 435-36. This is particularly true in the present case because, as this Court stated in *Reed v. Farley*, 512 U.S. 339 (1994),

> [t]he IAD's purpose — providing a *nationally uniform* means of transferring prisoners between jurisdictions — can be effectuated *only by nationally uniform interpretation*.

Id. at 348 (emphasis added). It is clear that no such "national uniformity" exists with respect to the issue presented herein and that, therefore, this case requires that certiorari be granted.

II.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS ERRONEOUS.

As indicated above, the decision of the Pennsylvania Supreme Court is in direct conflict with decisions in both the Fifth and the Sixth Circuit Courts of Appeal, where it has been held that a prisoner's filing of pretrial motions does not render him "unable to stand trial" and, accordingly, does not toll the

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5. *Compare Commonwealth v. Baker*, 627 N.E. 2d 469 (Mass. App. Ct. 1994); *People v. Torres*, 468 N.Y.S. 2d 606 (N.Y. 1983); *Knox v. State*, 848 P.2d 1354 (Wyo. 1993); *Jones v. State*, 813 P.2d 629 (Wyo. 1991) (finding IAD "speedy trial" provisions tolled) *with State v. Anonymous*, 419 A.2d 904 (Conn. Super. Ct. 1980); *Bunting v. State*, 564 A.2d 109 (Md. Ct. Spec. App. 1989); *State ex rel. Hammett v. McKenzie*, 596 S.W. 2d 53 (Mo. Ct. App. 1980); *State v. Shaw*, 651 P.2d 115 (N.M. Ct. App. 1982) (finding no tolling of the IAD "speedy trial" provisions).

limitation periods set forth in the IAD. In addition, the plain language and the legislative history of the relevant provisions of the IAD do not support the conclusion reached by the Pennsylvania Supreme Court in this case.

The relevant provisions of the IAD are as follows:

> trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Article IV(c), IAD. The IAD further provides:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of the said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

Article VI(a), IAD. Article V(c) of the IAD states that when trial does not occur within the time prescribed in Article IV(c), the charges shall be dismissed with prejudice.

In other words, the IAD provides two ways for the running of the 120-day time period to be tolled: Article IV(c)'s continuance "for good cause shown" and Article VI(a)'s tolling for "whenever and for as long as the prisoner is 'unable to stand trial.' " Insofar as it is undisputed that neither Mr. Montione nor the Commonwealth made a request for a continuance under the IAD in this case, this matter turns upon the interpretation of the phrase "unable to stand trial", and specifically, whether

the filing of a pretrial motion renders a prisoner "unable to stand trial" for purposes of Article VI(a) of the IAD.

Neither the enacted language nor the legislative history of the IAD addresses what, if any, effect a prisoner's filing of pretrial motions has on his ability to stand trial for purposes of Article VI(a). However, at least one court addressing the issue has adopted the plain language approach used by this Court in *Carchman v. Nash*, 473 U.S. 716 (1985), in holding that a prisoner's filing of pretrial motions did not toll the running of the IAD clock. *Bunting*, 564 A.2d at 113. Noting that the IAD is silent regarding the effects of a prisoner filing pretrial motions and that the granting of a continuance is available to prosecutors under its provisions, the court stated that "[p]re-trial motions are not uncommon" and that they

> might be filed by a prisoner . . . cannot have been beyond the contemplation of those who drafted the IAD or the legislators in the various states that [have] adopted it.

Id.; *see also State v. Shaw*, 651 P.2d 115, 120 (N.M. Ct. App. 1982) (holding that the time limitations of the Agreement were intended to permit sufficient time and opportunity for disposition of all pre-trial proceedings and commencement of trial before the [Article III or IV(c)] time expired).

Faced with the IAD's silence with respect to the meaning of "unable to stand trial", the Fifth Circuit, in *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), made the most complete examination of any of the courts interpreting that phrase. After reviewing how it was used by the federal courts in the fifteen years prior to Congress' enacting the IAD in 1970, the Court concluded that the phrase "unable to stand trial" was "*consistently* and *only* used by federal courts to refer to a party's

physical . . . or mental ability to stand trial."[6] *Id.* at 1340-41 (emphasis added). Accordingly, the *Birdwell* Court, unlike the Pennsylvania Supreme Court in the present case, declined to expand the phrase "unable to stand trial" "to encompass legal inability due to the filing of motions or requests", found the "unable to stand trial" tolling provision to be inapplicable, and dismissed the indictment with prejudice for failure to comply with the speedy trial requirements of the IAD. 983 F.2d at 1340-41.

Similarly, the Fifth Circuit, in *Stroble v. Anderson*, 587 F.2d 830, stressed that the IAD was "written as a protective measure for a transferred prisoner," and interpreted the phrase "unable to stand trial" to hold that its provisions will only toll the IAD clock where the record indicates that the prisoner was

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6. *See, e.g. Collins v. Walker*, 335 F.2d 417, 429 (5th Cir.), *cert. denied*, 379 U.S. 901, 85 S. Ct. 189, 13 L. Ed. 2d 175 (1964) (mental incompetence); *Arensman v. Brown*, 430 F.2d 190, 192 (7th Cir. 1970) (mental incompetence); *Miller v. Blalock*, 411 F.2d 548, 449 (4th Cir. 1969) (mental incompetence); *Arizona v. Hunt*, 408 F.2d 1086, 1089 (6th Cir.), *cert. denied*, 396 U.S. 845, 90 S. Ct. 81,24 L. Ed. 2d 95 (1969) (mental and physical inability); *United States v. Yeager*, 402 F.2d 918, 919 (3d Cir. 1968) (mental incompetence); *United States v. Knohl*, 379 F.2d 427, 432 (2d Cir.), *cert. denied*, 389 U.S. 973, 88 S. Ct. 472, 19 L. Ed. 2d 465 (1967) (physical inability); *Cameron v. Mullen*, 387 F.2d 193, 198 (D.C. Cir. 1967) (mental incompetence); *Evans v. United States*, 346 F.2d 512, 514 (8th Cir.), *cert. denied*, 382 U.S. 881, 86 S. Ct. 170, 15 L. Ed. 2d 121 (1965) (mental incompetence); *Powers v. United States*, 305 F.2d 157 (10th Cir. 1962) (mental incompetence); *United States v. Shapiro*, 222 F.2d 836, 837 (7th Cir. 1955) (physical inability).

Birdwell, 983 F.2d at 1340-41 n.22.

"physically or mentally disabled." *Id.* at 838. To hold otherwise, the court stated, would be to turn Article VI(a) "from a shield for the defendant into a sword for the prosecution." *Id.*

While some courts have indicated a concern with the burden that this interpretation might place on prosecutors or the courts, the position advanced by the Fifth and Sixth Circuits would not unduly hamper the prosecution of an IAD case where the prisoner exercises his right to file pretrial motions. As part of its thorough analysis, the *Birdwell* Court addressed the manner in which the IAD balances the receiving state's interest in prosecuting alleged criminals with the IAD's stated purpose in Article I to "encourage the expeditious and orderly disposition" of detainers which tend to "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation":

> Indeed, if a State objects or is unprepared to respond to a defense motion, the trial court, sua sponte or upon the motion of the prosecution, could grant a reasonable or necessary continuance so that it could adequately rule upon the motion or so that the State could prepare a response. Clearly, if good cause exists — *e.g.*, if the State's unpreparedness is not due [to] a lack of diligence — and the defendant or his counsel is present, the continuance granted will toll the . . . [Article III or IV(c)] . . . period. However, a blanket rule that allows periods between motions and rulings thereon to render defendants unable to stand trial under Article VI might encourage abuse. Prosecutors might be tempted to delay preparing a response for invalid reasons, knowing that the delay, though unreasonable and unnecessary, will not count in the IADA speedy trial computation. Such a rule might also encourage trial courts to delay ruling upon motions because of

> heavy dockets. We conclude, therefore, that when a State or trial court legitimately needs time to respond to or rule upon a defense motion, the trial court should grant a reasonable or necessary continuance consistent with the Article III(a) [or Article IV(c)] requirements.

983 F.2d at 1341 n.23; *see also Shaw*, 651 P.2d at 120 (simple statutory expedient of requesting continuance available to prosecution under IAD when defendants exercise right to file pretrial motions).

By focusing on interpreting the IAD consistently with Pennsylvania's Rule of Criminal Procedure No. 1100 (Pennsylvania's "speedy trial" rule) rather than analyzing, as the *Birdwell* Court did, the plain language of the IAD within the context of its stated purpose in Article I, the Pennsylvania Supreme Court erred. Not only does the IAD pre-date Pennsylvania's Rule 1100, but the IAD's goal of expedited resolution of outstanding detainers in multiple jurisdictions is simply not addressed or contemplated by Pennsylvania's procedural rule.

Comparison of the IAD to the federal Speedy Trial Act, 18 U.S.C. § 3161, by the federal courts is likewise inappropriate. As the *Birdwell* Court indicated, the federal Speedy Trial Act (like Pennsylvania's Rule 1100) was passed subsequent to Congress' enactment of the IAD and therefore could not have even been contemplated by Congress at the time it passed the IAD. 983 F.2d at 1338. In addition, the federal Speedy Trial Act specifically, by the language of its provisions, excludes certain amounts of time occasioned by a defendant's filing of motions; such explicit language is conspicuously absent from the IAD. Had Congress intended to exclude motion practice from the IAD time limitations, it could have used the same exclusionary language which was ultimately used in the federal

Speedy Trial Act. Finally, even if the Petitioner were to concede (which he does not) that some time should be excluded as a result of his filing of motions, the rule laid down by the Pennsylvania Supreme Court would apparently allow an indefinite amount of time to be excluded as long as a defendant's motions were undecided. Such a result is clearly not in concert with the IAD's purpose, stated in Article I, of "encouraging expeditious and orderly disposition of untried charges," and its Article IX directive that the "agreement shall be liberally construed so as to effectuate" that purpose.

In summary, the Pennsylvania Supreme Court's interpretation, in this case, of the phrase "unable to stand trial", as used in Article VI(a) of the IAD, is in direct conflict with decisions from the Fifth and Sixth Circuit Courts of Appeal, is not supported by the plain language and legislative history of the IAD, is contrary to the stated purpose and policy of the Act and, as such, is erroneous.

III.

THE QUESTION PRESENTED IS IMPORTANT.

As indicated above, there is a direct conflict among the circuit courts regarding the question presented in this case. Further, appellate courts in various states have addressed the issue with conflicting results. The purpose of the IAD — providing a nationally uniform means of transferring prisoners between jurisdictions — can be effectuated only by a nationally uniform interpretation of the IAD. Given the conflicts both in the circuits and in the state appellate courts, no such national uniformity currently exists on this matter of great importance to the nation's criminal justice system. This case presents the opportunity for the Court to exercise its certiorari jurisdiction to bring about the certainty and uniformity necessary to this area. Therefore, the Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED AND DECIDED NOVEMBER 24, 1998

[J-231-1997]
THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 69 M.D. Appeal Docket 1997

Appeal from the order of the Superior Court dated February 5, 1996 at No. 00794 PHL 1995, affirming the judgment of the Court of Common Pleas of Lackawanna County at Criminal Division No. 93-CR-1506

673 A.2d 923 (Pa.Super. 1996)

ARGUED: December 11, 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHARLES MONTIONE,

Appellant

OPINION OF THE COURT

MR. CHIEF JUSTICE FLAHERTY

DECIDED: November 24, 1998

Appendix A

We granted allocatur in this case solely to resolve an issue of first impression: whether filing pretrial motions tolls the statutory time limitations of the Interstate Agreement on Detainers (IAD), 42 Pa.C.S. § 9101 et seq.

On December 23, 1994, the Lackawanna County district attorney, pursuant to the IAD, filed a request for temporary custody of appellant who was then serving a 168 month sentence in the U.S. penitentiary at Lewisburg, Pennsylvania for a conviction on federal drug charges. The district attorney sought to try appellant on a charge of first degree murder as an accomplice, as well as other charges, in relation to a contract killing. Appellant was transferred from federal prison to state custody on February 4, 1994, and a preliminary hearing was held that day. Appellant was held for trial on all charges.

On February 17, 1994, the Commonwealth filed a motion to consolidate appellant's case with that of the principal in the murder. A hearing on the motion was scheduled for March 24, 1994, and then continued without objection until April 28, 1994. On March 17, 1994, appellant filed an omnibus pretrial motion that included motions to quash the information, to suppress statements, and to appoint an investigator. The Commonwealth answered appellant's motion on March 21, 1994.

In early July, appellant wrote two letters to the trial court, one stating that he was ready for trial and the other advising the court of the applicability of the IAD. On September 1, 1994, appellant filed a motion to dismiss the charges for violation of the IAD. On July 27 and September 22, the court entered orders finding appellant unable to stand trial as the motion to quash was still outstanding. On October 14, 1994, the motion to

consolidate was granted and the omnibus motion was denied. Trial was scheduled for November 17, 1994.

Trial was subsequently rescheduled for January 4, 1995, and after a hearing, the motion to dismiss was denied on December 20, 1994. Jury selection began on January 4, 1995, at which time appellant waived his right to a jury trial. Appellant's trial was separated from that of the principal who did not waive his right to a jury trial. A bench trial commenced on January 6, 1995. Appellant was convicted of first degree murder and criminal conspiracy and sentenced to life imprisonment plus five to ten years. The judgment was affirmed by the superior court. Appellant has since been returned to federal custody and now argues that the courts below erred by concluding that the filing of pretrial motions rendered him unable to stand trial, thereby tolling the time limitations of the IAD. We disagree.

The IAD is an agreement between forty-eight states, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States, that establishes procedures for the transfer of prisoners incarcerated in one jurisdiction to the temporary custody of another jurisdiction which has lodged a detainer against a prisoner. *Carchman v. Nash*, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985). Unlike a request for extradition, which is a request that the state in which the prisoner is incarcerated transfer custody to the requesting state, a detainer is merely a means of informing the custodial jurisdiction that there are outstanding charges pending in another jurisdiction and a request to hold the prisoner for the requesting state or notify the requesting state of the prisoner's imminent release. *Id.* The IAD is remedial legislation intended to curb previous abuses and alleviate problems associated with prisoners'

uncertainty resulting from unresolved charges pending in another jurisdiction.[1] *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984). Accordingly, the stated purpose of the IAD is to "encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." 42 Pa.C.S. § 9101, Article I.

When a detainer is lodged, the sending jurisdiction[2] must so inform the prisoner; the prisoner may then request that the outstanding charges be expeditiously resolved. 42 Pa.C.S.

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1. Prior to the IAD, the lodging of a detainer against a prisoner may have had many prejudicial effects. For example, efforts at rehabilitation are thwarted due to the anxiety and apprehension a prisoner experiences when faced with outstanding charges in another jurisdiction. *United States v. Mauro*, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978). Furthermore, the prisoner is often considered a higher risk of escape and is ineligible for more desirable work assignments or parole. *Id.* Additionally, the very informality of detainer proceedings, which did not carry with them the procedural protections of extradition proceedings, left them open for abuse. *Id.* For example, detainers "may be filed groundlessly, or even in bad faith," resulting in prejudices such as those described herein. *Id.* at 358 n.25, 98 S.Ct. at 1846 n.25, 56 L.Ed.2d at 345 n.25. One final concern is that sentencing courts may be reluctant to impose as long a sentence as might otherwise be appropriate since the prisoner would be facing additional prison time upon completion of his sentence. *Id.* at 360, 98 S.Ct. at 1847, 56 L.Ed.2d at 346-47.

2. For purposes of the IAD, the sending jurisdiction is the jurisdiction where the prisoner is incarcerated when he requests disposition of the charges or when a request for custody is made. 42 Pa.C.S. § 9101, Article II. The receiving jurisdiction is the jurisdiction where the prisoner will be tried on the pending charges upon which the detainer is based. *Id.*

§ 9101, Article III. Upon receipt of this request, the receiving jurisdiction has 180 days to bring the prisoner to trial.[3] *Id.* If the prisoner does not request the expeditious resolution of charges or challenges extradition, the receiving jurisdiction has 120 days to bring him to trial upon gaining custody of the prisoner. 42 Pa.C.S. § 9101, Article IV. The act also provides that the court may grant any necessary or reasonable continuance for good cause shown in open court with the prisoner or his counsel present, and that the statute is tolled "whenever and for as long as the prisoner is unable to stand trial, as determined by the court . . . ." 42 Pa.C.S. § 9101, Articles IV and VI. Appellant argues that a continuance was not properly granted and that the phrase "unable to stand trial" refers only to mental or physical inability and not legal inability.

Although this is an issue of first impression in Pennsylvania, several federal jurisdictions have considered this matter with conflicting results. Some courts have strictly construed the provisions of the IAD and applied it in a prophylactic manner in favor of the defendant. *See e.g., Birdwell v. Skeen*, 983 F.2d 1332, (5th Cir. 1993), and *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied* 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). However, many courts have reached the opposite conclusion and applied the IAD in a less severe manner. *See e.g., United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Johnson*, 953 F.2d 1167 (9th Cir. 1992), *cert. denied*, 506 U.S. 879, 113 S.Ct. 226, 121 L.Ed.2d 163 (1992); *United States v. Dawn*, 900 F.2d 1132, (7th Cir. 1990), *cert. denied*, 489 U.S. 949, 111 S.Ct. 368, 112

3. The prisoner is deemed to have waived extradition upon making a request for expeditious disposition of pending charges. 42 Pa.C.S. § 9101, Article III. The IAD provides procedures for the subsequent transfer of custody. 42 Pa.C.S § 9101, Article V.

L.Ed.2d 330 (1990); *United States v. Scheer*, *supra*; and *United States v. Hines*, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214, 1219; 104 S.Ct. 2656, 2668; 81 L.Ed.2d 363, 373 (1984). These courts have interpreted the IAD to allow for tolling of the time limitations for delays occasioned by the defendant such as the time it takes for disposition of motions filed by the defendant. *Neal*, 36 F.3d at 1210; *Dawn*, 900 F.2d at 1136; *Scheer*, 729 F.2d at 168; *Hines*, 717 F.2d at 1486 (additionally holding that delay excludable under the speedy trial act, 18 U.S.C. § 3161 et seq., was excludable under the IAD); and *Johnson*, 953 F.2d at 1172 (also holding that delay excludable under the speedy trial act was excludable under the IAD).

Although this court has not previously addressed tolling requirements in relation to the IAD, we find persuasive the analysis and interpretation of the courts that held that delay occasioned by the defendant is excludable, particularly in light of recent application of speedy trial provisions to IAD cases by Pennsylvania courts. *See e.g.*, *Commonwealth v. Woods*, 663 A.2d 803 (Pa.Super. 1995)(applying speedy trial provisions to the IAD in holding that defendant's continued presence in federal custody constitutes an inability to stand trial, thereby tolling the statute). *Cf. Commonwealth v. Riffert*, 549 A.2d 566 (Pa.Super. 1988), *alloc. denied*, 562 A.2d 825 (Pa. 1989)(holding that the speedy trial provision is tolled when a defendant's pretrial motion is pending). The *Woods* court determined that the IAD is consistent with the speedy trial provisions of Pa.R.Crim.P. 1100. *Woods*, 663 A.2d at 806.

Additionally, this court has explicitly held that the IAD may be tolled by the defendant's own actions. *Commonwealth v. Washington*, 411 A.2d 490 (Pa. 1979). In *Washington*, this court found no violation of the IAD where, in addition to

consenting to a continuance of his trial, the defendant also delayed the start of his trial by filing a motion to dismiss one day before his trial was to begin. *Id.* at 491. Although the court in *Washington* disposed of the defendant's motion one day later, unlike the present case in which the court took months to dispose of appellant's motions, such a distinction is not grounds for dismissal of the charges. We accept the superior court's reliance on *United States v. Taylor*, 861 F.2d 316 (1st Cir. 1988), for the premise that inquiry into the reasonableness of the time required to dispose of the appellant's motion is an inappropriate matter for review. The court held that it would be "imprudent and impractical" to scrutinize every motion in order to determine whether it could have been disposed of more expeditiously. *Commonwealth v. Motione*, 673 A.2d 923 (Pa.Super. 1996).

In the present case, appellant filed an omnibus pretrial motion including a motion to quash the information, as well as a motion to dismiss. The trial could not commence until these motions were resolved. By filing these motions, appellant implicitly consented to allow the court the requisite amount of time in order to dispose of them.

The judgment is affirmed.

Mr. Justice Nigro files a concurring opinion in which Mr. Justice Castille joins.

JUDGMENT ENTERED:
November 24, 1998

s/ Shirley Bailey
SHIRLEY BAILEY,
CHIEF CLERK

APPENDIX B — CONCURRING OPINION OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED AND DECIDED NOVEMBER 24, 1998

[J-231-97]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 69 M.D. Appeal Docket 1997

From the Order of the Superior Court, dated February 5, 1996, at No. 794 PHL 1995, affirming the judgment of the Court of Common Pleas of Lackawanna County at Criminal Division No. 93-CR-1506

673 A.2d 923 (Pa. Super. 1996)

ARGUED: December 11, 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHARLES MONTIONE,

Appellant

CONCURRING OPINION

MR. JUSTICE NIGRO DECIDED: November 24, 1998

Appendix B

I concur in the result reached by the majority. I write separately to clarify the reasoning behind my conclusion on this issue of first impression.

The issue presented is whether the filing of a pretrial motion tolls the time period within which Appellant had to be brought to trial under the Interstate Agreement on Detainers (IAD), 42 Pa.C.S. §§ 9101-9108 (1982). The IAD provides that:

> trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Id. § 9101, Article IV(c). The IAD further provides:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

Id. § 9101, Article VI(a).

Appellant argues that he was not brought to trial within 120 days, the case was not continued, and he was not "unable to stand trial" at any time before the running of the 120-day period. Appellant maintains that the lower courts erred by referring to speedy trial provisions contained in the Pennsylvania Rules of Criminal Procedure. Appellant also states that by finding that the filing of pretrial motions tolled the IAD's

time requirements, the lower courts in effect punished him for pursuing his right to file such motions by allowing them only at the expense of his rights under the IAD.

Appellant relies in part upon the Fifth Circuit Court of Appeals' decision in *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993). *Birdwell* involved another IAD provision requiring a prosecutor to bring a prisoner to trial within 180 days of when he receives a prisoner's request for a final disposition of the charges. At a hearing on the defendant's motion to dismiss, the trial court granted a continuance so that the State could determine whether it needed the testimony of its investigator, who was unavailable due to an injury. Although a one-week continuance was granted, the hearing did not resume for three weeks.

In considering the defendant's claim that the IAD was violated, the Fifth Circuit addressed whether the defendant's motions tolled the running of the 180-day time period. The court rejected the State's argument that the time period was tolled because the defendant was unable to stand trial from the time he filed motions until they were resolved. 983 F.2d at 1340-41. The court reasoned that the phrase "unable to stand trial" was consistently used by federal courts to refer to a party's physical or mental ability to stand trial. *Id.* The court declined to expand the phrase to encompass a legal inability to stand trial due to outstanding motions. *Id.* Since there was no contention that the defendant was mentally or physically unable to stand trial, the court concluded that the tolling provision did not apply. *Id.*[1]

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1. The court further held that the one-week continuance was not for good cause because the State could have determined before the hearing whether it needed its investigator to testify. *Id.* at 1340. The court also found that the additional two-week postponement did not toll the 180-day period because such a continuance was not granted in open court or in counsels' presence. *Id.* at 1339.

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Appellant also relies upon *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). In *Stroble*, the defendant was brought to Michigan on murder charges under the IAD. Shortly before his trial date, the defendant filed a petition for a writ of habeas corpus in district court and the state authorities continued the trial pending the disposition of the petition. Because of the continuance, the defendant was brought to trial more than 120 days after he was brought to Michigan.

While the district court found that the habeas corpus proceedings did not toll the IAD's time requirement, it rejected the defendant's claim that the IAD was violated because it concluded that the continuance tolled the 120-day period. The Sixth Circuit Court of Appeals, however, held that the 120-day requirement was violated. It found that the record did not disclose any determination by the state courts that the defendant was unable to stand trial. 587 F.2d at 838. He was within the trial court's jurisdiction and there was no showing that he was physically or mentally disabled. *Id.* The court further found that neither the defendant nor the prosecutor sought a postponement of the trial. *Id.* In addition, the record did not establish that the continuances were granted on good cause shown in open court, as required by the IAD, nor did it reflect a subsequent agreement to a continuance. *Id.* at 839.

While the issue on appeal in *Stroble* related to whether a continuance was granted on good cause shown in open court, *Birdwell* supports Appellant's argument that his pretrial motion did not toll IAD time requirements. Other federal courts, however, have reached the opposite result. In *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994), *cert. denied*, 117 S.Ct. 519 (1996), a defendant was convicted of various crimes in federal

court in New Hampshire. On appeal, the defendant argued that the district court erred in refusing to dismiss his indictment under the IAD because the court failed to try him within 120 days of his appearance in New Hampshire. In denying the motion to dismiss, the district court found that the 120-day time requirement was not violated in part because the clock was tolled while the defendant's pretrial motions were pending.

The First Circuit Court of Appeals affirmed, holding that delay attributable to the disposition of a defendant's motions is excludible from the 120-day time period. 36 F.3d at 1210. The court reasoned that the IAD's provision for tolling when a prisoner is unable to stand trial applies in this circumstance. *Id.* The First Circuit, however, holds out the possibility that an IAD violation may occur in certain cases where the court takes more time than necessary to resolve pretrial motions. *Id.* Under the facts in *Neal*, the court found that a 28-day delay in resolving the defendant's seven pretrial motions was not unreasonable, and that after excluding this delay, there was no violation of the IAD. *Id.*[2] In addition, the Seventh Circuit has also found that the "unable to stand trial" tolling provision applies when a defendant files pretrial motions. *See United States v. Dawn*, 900 F.2d 1132 (7th Cir.), *cert. denied*, 498 U.S. 949 (1990).

Employing a different rationale, the Ninth Circuit also tolls the time requirements of the IAD for delays attributable to a

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2. The majority cites the First Circuit case *United States v. Taylor*, 861 F.2d 316 (1st Cir. 1988), to support its conclusion that it is inappropriate to evaluate the reasonableness of the time a court takes to decide a motion. While the First Circuit found such a review inappropriate under the facts of *Taylor*, as stated in *Neal*, the *Taylor* court left open the possibility that under certain circumstances, a lengthy delay in disposing of a motion may constitute a violation of the IAD.

defendant's pretrial motions. In *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992), the court addressed a challenge that the defendant's trial was untimely under the 180-day IAD requirement. The court stated that the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174, and the IAD speedy trial provision serve the same purposes. 953 F.2d at 1172.[3] The court held that since the Speedy Trial Act excludes a delay attributable to a defendant's pretrial motions under Section 3161(h)(1)(F), the IAD's time requirements are also tolled. *Id.* The Second and Fourth Circuits have also concluded that time periods excluded under the Speedy Trial Act likewise should be excluded under the IAD. *See United States v. Cephas*, 937 F.2d 816 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992)(holding that the "for good cause shown" tolling provision encompasses the same circumstances as the rules for excludable time under the Speedy Trial Act);[4] *United States v. Hines*, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984)(looking to the Speedy Trial Act in finding that pretrial motions tolled IAD time periods).[5]

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3. Like the IAD, the Speedy Trial Act provides time frames in which the government must bring criminal defendants, including those in prison, to trial. The acts contain different time limits and language. Both allow their time limits to be tolled. While the IAD provides a general tolling provision, the Speedy Trial Act enumerates specific exclusions. *See United States v. Cephas*, 937 F.2d 816 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992) (discussing both acts).

4. Prior to *Cephas*, the Second Circuit had also found the time required to dispose of the defendant's pretrial motions excludable under the "unable to stand trial" provision. *See United States v. Scheer*, 729 F.2d 164 (2nd Cir. 1984).

5. The First Circuit has also looked to the Speedy Trial Act in deciding this issue in addition to applying the "unable to stand trial" provision. *See, e.g., United States v. Walker*, 924 F.2d 1 (1st Cir. 1991).

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The Ninth Circuit Court of Appeals more recently reviewed the three different standards the Circuit Courts have used to determine whether a prisoner is unable to stand trial under the IAD in *United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996). The Ninth Circuit rejected as too narrow the standard that the defendant be physically or mentally incapacitated to toll the time requirement. 90 F.3d at 1427. It stated that the IAD provides in Article VI(b) that it does not apply to persons who are mentally ill. *Id.* The court stated that if the drafters wanted to exclude only the physically incapacitated in addition to the mentally ill, they would have done so. *Id.*

The Ninth Circuit also declined to adopt the legally "unable to stand trial" standard due to outstanding motions because it is too broad. *Id.* The court stated that it provides little guidance and its meaning could only be developed slowly on a case-by-case basis. *Id.* The court found the Second and Fourth Circuit's approach — applying the tolling provisions of the Speedy Trial Act — most sensible. *Id.* Consistent with its decision in *Johnson*, it held that any delay excusable under that Act also tolls the clock under the IAD. *Id.* Since the law under the Speedy Trial Act is developed, the district courts would have guidance. *Id.* Applying this test, the court held that the defendant's filing of motions in limine tolled the IAD's time requirements since they do so under the Speedy Trial Act. *Id.* at 1428.

While the Speedy Trial Act applies to federal prosecutions, Pennsylvania has its own speedy trial provision under Rule of Criminal Procedure 1100. In determining when trial must begin under Rule 1100, the time requirements are tolled in part for periods of delay resulting from the unavailability of the defendant and from any continuance granted at the defendant's

request. Pa. R. Crim. P. 1100(c). Under Rule 1100, a defendant is unavailable from the time he files a pretrial motion until the court disposes of it because trial cannot begin until the motion is decided. *Commonwealth v. Chilcote*, 396 Pa. Super. 106, 113, 578 A.2d 429, 432 (1990), *appeal dismissed*, 533 Pa. 357, 625 A.2d 614 (1993); *Commonwealth v. Riffert*, 379 Pa. Super. 1, 9, 549 A.2d 566, 570 (1988), *appeal denied*, 522 Pa. 602, 562 A.2d 825 (1989).

Having considered the rationale employed in similar cases decided by the federal courts, I conclude that the Superior Court properly looked to authority interpreting Rule 1100 to decide whether the IAD's time requirements are tolled by pretrial motions. Like the Speedy Trial Act and the IAD, Rule 1100 seeks to ensure that those who are accused of a crime are quickly brought to trial.[6] I agree with the Superior Court that it is desirable to maintain consistency when resolving issues similar to both speedy trial provisions, and that such congruity benefits the trial courts and practicing attorneys. Appellant argues that looking to Rule 1100 authority is inappropriate because Rule 1100 is a procedural rule and the IAD was promulgated by the legislature. As recognized by the Superior Court, Rule 1100 authority does not control the interpretation of the IAD. However, given that the Rule and the IAD seek the expeditious resolution of criminal charges, it is appropriate to look to Rule 1100 authority for guidance. *See also Commonwealth v. Woods*, 444 Pa. Super. 521, 663 A.2d 803 (1995)(consistent with Rule 1100, the court held that the defendant was unable to stand

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6. The IAD's requirements further serve to promote prisoner rehabilitation by eliminating uncertainties which accompany the filing of detainers. *Commonwealth v. Fisher*, 451 Pa. 102, 106, 301 A.2d 605, 607 (1973).

trial under the IAD during the time it took to retrieve him from federal prison).[7]

Finally, Appellant argues that by finding that the filing of pretrial motions tolled the IAD's time requirements, he is in effect punished for pursuing his right to file such motions. I disagree. Appellant sought to benefit from filing pretrial motions. Such motions necessarily result in delays. As aptly stated by the Commonwealth, to hold otherwise would place the keys to the jailhouse door in Appellant's hands by allowing him to file pretrial motions and at the same time allowing the IAD time clock to run.

For these reasons, I concur in the result reached by the majority to affirm the Superior Court's decision.

Mr. Justice Castille joins in the Concurring Opinion.

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7. *But see Commonwealth v. Thornhill*, 411 Pa. Super. 382, 601 A.2d 842 (1992) (declining to consider Rule 1100 authority to determine if IAD time requirements were violated).

APPENDIX C — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED FEBRUARY 5, 1996

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00794 Philadelphia 1995

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES MONTIONE,

Appellant

Appeal from JUDGMENT OF SENTENCE January 26, 1995, in the Court of Common Pleas of LACKAWANNA County, CRIMINAL, No. 93-CR-1506.

BEFORE: McEWEN, CIRILLO, and OLSZEWSKI, JJ.

OPINION BY OLSZEWSKI, J.

Charles Montione appeals from a judgment of sentence entered in the Court of Common Pleas of Lackawanna County. We affirm.

The procedural history of this case is undisputed. On October 8, 1993, a criminal complaint was filed charging Montione with, *inter alia*, first-degree murder in connection with the contract killing of Edward "Ned" Tracy.[1] At the time,

1. Tracy was bludgeoned to death in lieu of $14,000 he owed to Montione for drugs.

however, Montione was already incarcerated at the Lycoming County Prison where he was awaiting sentencing after pleading guilty to federal drug charges. On November 4, 1993, Montione was sentenced to 168 months for the drug charges and, subsequently, was transferred to the United States Penitentiary at Lewisburg, Pennsylvania. As the Commonwealth had yet to try Montione on the murder charges, the District Attorney of Lackawanna County, on December 23, 1993, filed a Form V, Request for Temporary Custody, pursuant to Article IV of the Interstate Agreement on Detainers (IAD).

On February 4, 1994, Montione was transferred from Lewisburg and into the custody of the Commonwealth of Pennsylvania. After a preliminary hearing and arraignment, Montione filed an omnibus pre-trial motion on March 17, 1994. This motion included a motion to quash the information, a motion to suppress statements, and a motion for the appointment of an investigator.

On September 1, 1994, Montione filed a motion to dismiss alleging that the Commonwealth had violated the terms of the IAD by failing to bring him to trial within 120 days. Earlier, on July 27, the Honorable John S. Cottone had issued an order finding that the IAD's 120-day limit had been tolled. Judge Cottone issued a similar order on September 22. Finally, on October 14, 1994, Judge Cottone denied the motion to quash and scheduled Montione's trial for November 17.

Subsequently, Montione's case was re-assigned to the Honorable James M. Munley. On November 28, 1994, Montione filed supplemental pre-trial motions. After entertaining arguments on the motion to dismiss, Judge Munley denied said motion on December 20, 1994. Moreover, Judge Munley denied

the last of Montione's pre-trial motions on December 30, 1994. Ultimately, Montione was convicted of first-degree murder, criminal solicitation and criminal conspiracy. He was sentenced to life plus five-to-ten years imprisonment. In this timely appeal, Montione alleges solely that his motion to dismiss was improperly denied.

At the outset, we note that the "Interstate Agreement on Detainers "is a compact among 48 states, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States." *Carchman v. Nash*, 473 U.S. 716, 719, 105 S. Ct. 3401, 3402, 87 L.Ed. 2d 516, 520 (1985).[2] "A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Id.* "The purpose sought to be achieved by the [IAD] is to promote and foster prisoner treatment and rehabilitation programs by eliminating the uncertainties which accompany the filing of detainers." *Commonwealth v. Fisher*, 451 Pa. 102, __, 301 A.2d 605, 607 (1973). To accomplish this goal, the IAD requires, in pertinent part, that "trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state." 42 Pa.C.S.A. § 9101 Article IV(c).

Instantly, there is no question that the 120-day clock started to run on February 4, 1994, when Montione was transferred from federal to state custody. Thus, almost a full year had elapsed before Judge Munley commenced Montione's trial on January 5, 1995. At first blush it would appear that the

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2. Louisiana and Mississippi are the only states which have not enacted the IAD. Pennsylvania has codified the Agreement at 42 Pa.C.S.A. § 9101, *et seq.*

Commonwealth violated the IAD's 120-day provision. This speedy trial provision, however, is not unqualified. Article IV(c) of the IAD provides, in pertinent part, that "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Moreover, Article VI(a) provides that "[i]n determining the duration and expiration dates of the time periods provided in . . . this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." Thus, we must determine whether Montione's various pre-trial motions constituted a continuance for "good cause" and/or rendered him "unable to stand trial."

In deciding this issue, we note that our task is an arduous one. This matter has never been definitively addressed by a Pennsylvania appellate court, and, consequentially, we are presented with a case of first impression. Moreover, a review of caselaw from other jurisdictions reveals that strong arguments exist on both sides of the issue, as evidenced by the division among our federal courts. The United States Court of Appeals for the First, Second, Fourth, Seventh and Ninth Circuits have decided that a defendant's pretrial motion does toll the IAD time period. *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Whiting*, 28 F.3d 1296 (1st Cir. 1994); *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 226, 121 L. Ed. 2d 163 (1992); *United States v. Cephas*, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, __ U.S. __, __ S. Ct. __, 116 L. Ed. 2d 788 (1992); *United States v. Walker*, 924 F.2d 1 (1st Cir. 1991); *United States v. Dawn*, 900 F.2d 1132 (7th Cir.), *cert. denied*, __ U.S. __, 112 L.Ed.2d 330, __ S.Ct. __ (1990); *United States v.*

Nesbitt, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015, 109 S.Ct. 808, 102 L.Ed.2d 798 (1989); *United States v. Sheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Hines*, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214, __ S.Ct. __, __ L.Ed.2d __ (1984). The Court of Appeals for the Fifth and Sixth Circuits, however, have reached the opposite conclusion. *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993); *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). Against this backdrop, we begin our own trek in attempting to resolve the issue in manner consistent with justice and fairness.

In deciding issues concerning the IAD, this Court has sought guidance from caselaw concerning Pennsylvania's own speedy trial rule, Pa.R.Crim.P. 1100." *See Commonwealth v. Woods*, __ Pa.Super. __, 663 A.2d 803 (1995); *Commonwealth v. Kripplebauer*, 322 Pa.Super. 317, 469 A.2d 639 (1983) . We acknowledge that Rule 1100 analysis certainly is not binding regarding interpretation of the IAD. *See Commonwealth v. Thornhill*, 411 Pa.Super. 382, 601 A.2d 842 (1992) ("Rule 1100 is a procedural rule implemented by our Supreme Court, the interpretation of which is subject to judicial creation," while the IAD is "a legislatively enacted statute, the interpretation of which is governed by the legislative intent and purpose"). We cannot, however, discount the importance of Rule 1100 analysis as a navigational tool in our search for justice when deciding IAD issues. Moreover, we find it desirable to maintain consistency when resolving issues similar to both speedy trial provisions. Obviously, such congruity benefits our state's trial courts, practicing attorneys and other interested parties.

As noted above, the IAD's time provision is tolled when the defendant is "unable to stand trial." Nearly identical

language qualifies Rule 1100. Time to trial calculation under Rule 1100 is tolled during delays attributable to "the unavailability of the defendant." Pa.R.Crim.P. 1100(c)(1)(i). Further, in *Commonwealth v. Riffert*, 379 Pa.Super. 1, 549 A.2d 566 (1988), *alloc. denied*, __ Pa. __, 562 A.2d 825 (1989), we addressed the issue of whether a defendant's pretrial motion renders him "unavailable" for the purposes of Rule 1100. After noting that the defendant's trial could not commence until after his pretrial motion was decided, we held that "[defendant] thus was unavailable to be tried while his omnibus motion was pending. Implicitly, he had obtained a postponement or continuance of his trial during such time." *Id.* at __, 549 A.2d at 571. *See also Commonwealth v. Chilcote*, 394 Pa.Super. 106, 578 A.2d 429 (1990), *alloc. denied*, __ Pa. __, 590 A.2d 756 (1991); *Commonwealth v. Palmer*, 384 Pa.Super. 379, 558 A.2d 882, *alloc. denied*, __ Pa. __, 569 A.2d 1365 (1989).

In reaching this conclusion, we were persuaded by President Judge Spaeth's concurrence in *Commonwealth v. Bond*, 350 Pa.Super. 341, 358, 504 A.2d 869, 878 (1986) (*en banc*):

> The critical point as I see it, is that in instituting her constitutional challenge, appellant initiated foreseeable delay for which the Commonwealth was not responsible. The period extending from the date of the trial court's order denying the motion should be excluded from the 180-day period. To permit the period to run while the court deliberated on the motion would be to permit appellant to wield her right to a speedy trial in an unjust and uncontemplated manner.

Appendix C

We believe that our reasoning and decision in *Riffert* is instructive in resolving the case at hand. Our resolution of *Riffert* is consistent with the well established principle that "[w]hen the defendant causes the delay he is not entitled to be discharged." *Commonwealth v. Thompson*, 343 Pa.Super. 408, __, 495 A.2d 560, 561 (1985) (citing *Commonwealth v. Wilson*, 231 Pa.Super. 451, 454 n.6, 331 A.2d 792, 794 n.6 (1974)). This precept has been held to apply equally to Rule 1100 and the IAD. *See Thompson, supra*; *Commonwealth v. Lloyd*, 341 Pa.Super. 107, __, 491 A.2d 173, 177 (1985) ("Appellant benefited from the delays of trial. It would be error to reward him further with dismissal of the charges."); *Commonwealth v. Gallo*, 276 Pa.Super. 562, __, 419 A.2d 601, 603 (1980) ("where a defendant is responsible for the delay he cannot later benefit from the delay that he, himself, caused"). *See also Commonwealth v. Koonce*, 511 Pa. 452, __, 515 A.2d 543, 548-49 (1986). As such, we find that the IAD's speedy trial provision is tolled once the defendant files pre-trial motions.[3]

Next, we must decide the length of time for which the provision is tolled. Montione alleges that his pre-trial motions presented simple issues which could have been quickly resolved by the trial court. We find this assertion to be irrelevant.

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3. In arguing to the contrary, Montione relies almost exclusively upon our decision in *Commonwealth v. Kripplebauer, supra*. We find this reliance to be misplaced. There, a panel of this Court held that the IAD's time mandate was not tolled during the thirty-day period the defendant had requested to file pre-trial motions. As such, we made no decision concerning whether the time provision was tolled once the defendant had, in fact, filed such motions. Moreover, the panel's decision in *Kripplebauer* was predicated upon outdated caselaw concerning a version of Rule 1100 which has since been repealed. Consequentially, we must even question the continued validity of *Kripplebauer*'s narrow holding.

Whether the time utilized by the trial court in resolving the issues was unreasonable is simply not an inquiry suitable for our review. In so finding, we are persuaded by the following language:

> [W]e think it inappropriate for us to scrutinize each defense motion for the purposes of deciding whether a judge should have been able to dispose of it in two days, two weeks or two months. Many factors effect a judge's readiness to render a decision, and we would overstep our role were we to intrude routinely into the trial judge's deliberative process.

United States v. Taylor, 861 F.2d 316, 321-322 (1988). As such, we are convinced that it would be imprudent and impractical to exclude less than the full time between defendant's filing of a pretrial motion and its resolution.

Presently, the IAD time clock started to run on February 4, 1994, when Montione was transferred into the state's custody. The clock was tolled forty-one days later, however, on March 17, 1994, when Montione filed his omnibus pre-trial motion. Subsequently, Montione filed various additional pretrial motions. The record reveals that, until December 30, 1994, at least one such pre-trial motion remained unresolved. As such, we find that the entire period from March 17 to December 30 must be excluded from Montione's time to trial.[4] Thus, when his trial ultimately commenced on January 5, 1995, only

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4. We acknowledge that some of Montione's pre-trial motions were non-dispositive. We do not believe, however, that non-dispositive motions should be treated differently than dispositive motions. As stated in *United States v. Whiting*, 28 F.3d at 1307, "both types are likely to delay trial and both should be treated the same."

forty-seven days had elapsed for purposes of computing his time to trial under the IAD. Consequently, we find that Montione is entitled to no relief under the IAD.

Judgment of sentence affirmed.

The foregoing Opinion of the Superior Court is reported at 449 Pa.Super. 239, 673 A.2d 923 (1996).

APPENDIX D — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY, CRIMINAL DIVISION DATED AND FILED DECEMBER 20, 1994

IN THE COURT OF COMMON PLEAS
OF LACKWANNA COUNTY
CRIMINAL DIVISION

NO. 93 CR 1506

COMMONWEALTH OF PENNSYLVANIA

VS.

CHARLES MONTIONE, DEFENDANT

OPINION

MUNLEY, J.

Defendant argues that murder charges against him must be dismissed because he was not tried within the 120-day limitations period as required in the Interstate Agreement on Detainers Act. 42 Pa.C.S.A. §9101, et al. We disagree.

Article IV (c) of the I.A.D. provides that trial of a transferred prisoner "shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for cause shown in open court, . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance." I.A.D. Article V (c) states that when trial does not occur within the time prescribed, the charges shall be dismissed with prejudice. Article VI (a) states: "In determining the duration and expiration dates of the periods provided in Article III and

IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of this matter".

Although there is no Pennsylvania caselaw which has addressed this particular question under identical factual circumstances, nonetheless, there are factual rulings by the federal courts and the courts of other states, contents which, if not identical present the same questions dealt with here.

The controlling question in determining whether a defendant is entitled to a discharge under the 120-day statute is whether the delay of the trial beyond 120 days was "occasioned by the defendant", and, if so, he is not entitled to discharge under the statute. *People v. Leonard*, 310 N.E. 2d 15, 17 (1974). Courts have interpreted this language "to exclude all those periods of delay occasioned by the defendant." *United States v. Scheer*, 729 Fed.2d 164, 168 (2nd Cir. 1984); *United States v. Nesbitt*, 852 Fed.2d 1502, 1516 (7th Cir. 1988); *United States v. Roy*, 771 Fed.2d 54, 59 (2nd Cir. 1985); *Bush v. Muncy*, 659 Fed.2d 402, 408-09 (4th Cir. 1981); *United States v. Black*, 609 Fed.2d 1330, 1334-35 (9th Cir. 1979); *Foran v. Metz*, 463 Fed.Sup. 1088, 1097 (S.D.N.Y. 1979), affm'd without opinion, 603 Fed.2d 212 (2nd Cir. 1979). Thus, courts have held that a defendant waives the 120-day limitation during the time it takes to resolve defense matters raised by him.

Defendant's motion to dismiss the prosecution for non-compliance with the statutory trial period was made on September 1, 1994, after the unsuccessful interposition of an omnibus motion made on March 17, 1994, the omnibus motion was denied on October 14, 1994. Additionally, on July 27, 1994

and on September 22, 1994, the court ruled that since there was an outstanding motion, a motion to quash, which was dispositive, that Defendant was unable to stand trial. Thus, we find from March 17, 1994 through October 14, 1994 will be considered excludable time under the Interstate Agreement on Detainers Act. When an omnibus motion is made, a reasonable time for response by the prosecution and a period for decision of the motion by the judge by whom it was heard may be excluded in the computation of the period of delay chargeable to the Commonwealth. *People v. Torres*, 656 N.E.2d 497 (1983).

The period of time during which the Court holds under submission a matter raised by the Defendant is time during which "the prisoner is unable to stand trial". We think it would be inappropriate for us to scrutinize the defense motion for the purpose of deciding how quickly the judge should have been able to dispose of the defense motion in order to avoid a violation of the I.A.D. time constraints. See generally *United States v. Taylor*, 861 Fed.2d 316 (1st Cir. 1988).

We find the I.A.D. clock in this case began to run on February 4, 1994 when Mr. Montione was transferred from the custody of the Warden of the Federal Penitentiary at Lewisburg and was placed into the custody of the Commonwealth of Pennsylvania pursuant to Article 4(a) of the I.A.D.. On March 17, 1994 the I.A.D. clock was stopped when Montione filed his omnibus motion. It was not until October 14, 1994 when the Court issued its order denying the omnibus motion, that the I.A.D. clock began to run again.

In arguing his motion, the Defendant relies extensively on *Commonwealth v. Kripplebauer*, 469 A.2d 639 (1983), however his reliance is misplaced since that decision was based upon

conclusions of law found within the now repealed version of Pa.R.Crim.P. 1100. In *Kripplebauer*, defendant's request for thirty days to file pretrial motions was not considered a continuance for purposes of I.A.D. time constraints. The cases relied upon in *Kripplebauer* dealt with whether or not a motion the defendant filed would be excludable or akin to a continuance. They examined Rule 1100 as it then existed and decided that that motion was not looked upon as a continuance. We find the facts are dissimiliar in the case at bar. The courts direct review of state and federal decisions[1] is quite clear that when there is an omnibus pretrial motion filed by the defendant, as it presently exists in this case, all of the time thats expended deciding that motion, is excluded. See generally *Commonwealth v. Chilcote*, 578 A.2d 429 (1990). The time intervening between a defendant's pretrial motion and the trial court's disposing of the motion is excludable from computation of speedy trial period because the defendant is "unavailable for trial". A close reading of *Kripplebauer* clearly supports this position.

Factually, *Kripplebauer* involved a defendant who was sent into custody of Allegheny County officials on November 9, 1981, at the request of the Allegheny County District Attorney, and should have been tried on or before March 9, 1982. The Commonwealth requested that a trial date be set for January 29, 1982, one day after the termination of the thirty day period for filing pretrial motions. The trial court denied that motion and set the trial date for March 30, 1982, which was beyond the 120-day limitation period found in Article IV of the I.A.D.. Subsequently, the charges against the defendant were dismissed.

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1. Federal interpretation of the Interstate Agreement on Detainers Act governed over Pennsylvania Superior Court interpretation of agreement. *Adams v. Cuyler*, 592 Fed.2d 720, C.A. 1979, affm'd 101 S.Ct. 703, 449 U.S. 433, 66 L.Ed.2d 641.

Appendix D

The Commonwealth appealed this dismissal on the ground that the defendant was "unable to stand trial" under Article IV. In analyzing the Commonwealth's assertion of error, the court noted that the defendant exercised a right provided by the Rules of Criminal Procedure pursuant to the then existing version of Pa.R.Crim.P. 1100. The court further noted that Rule 1100 caselaw, was not controlling under an I.A.D. argument, but was certainly instructive as to whether a defendant renders himself "unable to stand trial". And, under the present Rule 1100 the filing of an omnibus motion renders the defendant "unavailable for trial", since trial cannot commence until such motion is disposed of. See also *Commonwealth v. Riffert*, 549 A.2d 566 (1988); *Commonwealth v. Chilcote*, supra..

We also find the analysis and interpretation of Rule 1100 contained in caselaw can be used as a guidepost in deciding this case. Under the existing law, a defendant is deemed "unavailable for trial" for purposes of Rule 1100 from the time a defendant files an omnibus motion until such time as that motion can be disposed of. Fundamental fairness and the desire for a consistent interpretation of the law demands that this same principle hold true when evaluating a defendant's ability to stand trial under the I.A.D.. Since the Defendant's omnibus pretrial motion remained outstanding from March 17, 1994 through October 14, 1994, the Defendant could not have been brought to trial under the Rules of Criminal Procedure. It is the Defendant's own actions which have caused the delay in this case. By filing the omnibus motion, the Defendant explicity consented to any delay occasioned in disposing of his motion.

Based upon a review of the record, we find that the time limits contained in the Interstate Act on Detainers were properly tolled, therefore, the Defendant's motion to dismiss must be denied.

Appendix D

ORDER

AND NOW, to wit, this 20th day of December, 1994, it is hereby ORDERED and DECREED that the Defendant's Motion to Dismiss is DENIED.

BY THE COURT:

s/ Munley, J. J.

For the Commonwealth: Michael Barrasse, Esq., D.A.
Andrew Jarbola, Esq., A.D.A.
Gene Talarico, Esq., A.D.A.

For the Defendant: Frank Nocito, Esq.
William Ruzzo, Esq.

The foregoing Opinion is reported at 96 Lackawanna Jurist 1 (1995).

APPENDIX E — RELEVANT STATUTE

18 U.S.C.A. App. 2, § 2

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legall joining in substantially the following form:

"The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedure. It is the further purpose of this agreement to provide such cooperative procedures.

Appendix E

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided, That for good cause shown in open court,

the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate

prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(c) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purpose of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Appendix E

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: And provided further, That there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(c) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving state shall

be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order, dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer

or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being held shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The

provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Appendix E

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purpose. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to amy government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the Constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

* * * *

No. 98-1360

Supreme Court, U.S.
FILED
APR 1 1999
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES MONTIONE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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STATEMENT OF THE CASE

On October 8, 1993, a criminal complaint was filed charging the petitioner with, *inter alia*, First Degree Murder as an Accomplice for his participation in the brutal "contract killing" of Edward "Ned" Tracy in February, 1986. On December 23, 1994, the Commonwealth of Pennsylvania, through the Lackawanna County District Attorney's Office, filed a *Form V Request for Temporary Custody* of petitioner pursuant to the Interstate Agreement on Detainers (IAD), 42 Pa. C.S. § 9101, *et seq*. At the time, the petitioner was a sentenced federal prisoner housed at the United States Penitentiary at Lewisburg, PA. Upon receipt of the aforementioned *Form V* request, the petitioner exercised his rights under the IAD and indicated his intention to contest his return to Lackawanna County by requesting thirty (30) days within which to do so.

Ultimately, on February 4, 1994, the petitioner was transferred from the custody of federal officials and placed into the custody of the Commonwealth of Pennsylvania pursuant to its *Form V* request under Article IV(c) of the IAD. On February 4, 1994, petitioner's preliminary hearing on the murder charges was held and all counts were held for further court action.

On February 17, 1994, the Commonwealth filed a motion to consolidate petitioner's case with that of Charles Oliver who had been charged as a principal in the murder of Mr. Tracy. A hearing on the motion to consolidate, along with a court-scheduled pre-trial conference, was set for March 24, 1994, before Judge S. John Cottone. However, said hearing

was continued until April 28, 1994, by counsel for Mr. Oliver, without objection from either the district attorney or counsel for petitioner, Mr. Montione.[1]

On March 17, 1994, petitioner filed an Omnibus Pretrial Motion which included a Motion to Quash the Information, a Motion to Suppress Statements and a Motion to Appoint a Private Investigator. The Commonwealth filed an answer to petitioner's Omnibus Pretrial Motion on March 21, 1994. At no time during the pretrial motion proceedings did the Petitioner advise the trial court of the applicability of the IAD nor did he address the IAD in any pleadings prior to September 1, 1994. On July 27, Judge Cottone, after hearing arguments from both the petitioner and the Commonwealth, entered an order finding that the appellant was "unable to stand trial" pursuant to the IAD since petitioner's Omnibus Pretrial Motion remained unresolved. Moreover, on September 22, 1994, Judge Cottone entered a similar order finding the petitioner "unable to stand trial" since petitioner's motion was still unresolved.

On September 1, 1994, petitioner filed a Motion to Dismiss pursuant to the IAD, alleging that the Commonwealth had failed to bring him to trial within the 120-day time frame mandated by Article IV(c) of the IAD.[2] On October 14, 1994,

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1. An order was entered on March 24, 1994, by Judge S. John Cottone granting Mr. Oliver's request for a continuance and noting that petitioner had *no objection to the grant of said continuance.*

2. In July 1994, petitioner, unbeknownst to the Commonwealth, wrote two letters to Judge Cottone advising the court of his readiness for trial and the latter correspondence spoke of the applicability of the IAD. However, there is no evidence nor is there a suggestion by the petitioner that the court read the contents of the correspondence (Cont'd)

Judge Cottone granted the Commonwealth's motion to consolidate, denied petitioner's Omnibus Pretrial Motion and scheduled trial for November 17, 1994. After hearing arguments on that motion, both the petitioner's case and that of Mr. Charles Oliver, were re-assigned to Judge James M. Munley since Judge Cottone was scheduled to begin a protracted capital murder trial in the Fall of 1994. Subsequently, the November 17, 1994, trial date was re-scheduled. On December 20, 1994, after hearing argument and receiving briefs on the matter, Judge Munley issued an Opinion and Order denying petitioner's motion to dismiss.

Petitioner then waived his right to a jury trial and a bench trial commenced on January 6, 1995. As a result of petitioner's waiver, his case was separated from that of his co-defendant, Charles Oliver. Ultimately, petitioner was convicted of First Degree Murder and Criminal Conspiracy and was sentenced to a term of life plus five (5) to ten (10) years in a state correctional facility. Petitioner was then returned to federal custody were he remains at present.

(Cont'd)
since they would have constituted *ex parte* communication. Since the correspondence was not forwarded to the Commonwealth nor was it authored by counsel for petitioner, it is of dubious significance for the question before the court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS IN ACCORD WITH A MAJORITY OF UNITED STATES COURTS OF APPEAL WHO HAVE DECIDED THE ISSUE IN QUESTION AND THE DECISION OF THE PENNSYLVANIA SUPREME COURT DOES NOT FURTHER AGGRAVATE THE EXISTING SPLIT OF AUTHORITY.

It is true that the Pennsylvania Supreme Court recognized that an off-balanced split of authority exists among the various circuits within the United States Courts of Appeal regarding the interpretation of the phrase "unable to stand trial" in Article VI(a) of the IAD.[3] Specifically, six (6) United States Circuit Courts have held that the IAD's "speedy trial" provision, Article VI(a), may be tolled by the prisoner's filing of pretrial motions.[4] However, both the Fifth and Sixth

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3. The respondent does not contest petitioner's assertion that interpretation of the IAD presents a federal question thereby allowing review of a state court decision by a federal court. *See Cuyler v. Adams*, 449 U.S. 433 (1981). As such, the jurisdiction of this court is not questioned. However, the respondent suggests that though review by United States Supreme Court is permissible, it is unnecessary in light of the well-reasoned, legally accurate decision handed down by the Pennsylvania Supreme Court.

4. *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Whiting*, 28 F.3d 1296 (1st Cir. 1994); *United States v. Walker*, 924 F.2d 1 (1st Cir. 1991); *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Cephas*, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Hines*, (Cont'd)

Circuits have reached opposite conclusions on the same question. *See Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993).

Though decisions rendered by both the Fifth and Sixth Circuits differ with those of six (6) other federal circuits, the Respondent suggests that the presence of a small dissenting minority among federal circuits does not automatically trigger the need for review by the United States Supreme Court. In fact, a review of the decisions of the First, Second, Fourth, Seventh, Eighth and Ninth Circuits reveals a more well-reasoned interpretation of the IAD's tolling provisions since it is desirable "[t]o maintain consistency when resolving issues similar to [ ] speedy trial provisions, and that such congruity benefits the trial courts and practicing attorneys." *Commonwealth v. Montione*, 720 A.2d 738, 744 (Pa. 1998) (Nigro, J., *concurring*). Moreover, such congruity also inures to the benefit of a detainee by demonstrating a clear and consistent interpretation of speedy trial provisions.

It is also well to note that the Sixth Circuit's decision in *Stroble v. Anderson*, *infra*, was handed down in 1978. Since that time seven (7) different federal circuits passed upon the same issue as the *Stroble* court with all but one finding, implicitly or explicitly, that *Stroble* employed faulty logic or analysis thereby resulting in opposite conclusions. Moreover,

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(Cont'd)

717 F.2d 1481 (4th Cir. 1983); *United States v. Dawn*, 900 F.2d 1132 (7th Cir.), *cert. denied*, 498 U.S. 949 (1990); *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988); *United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996); *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992).

the decisions in *Cephas*, *Dawn*, *Hines* and *Nesbitt* occurred ***after*** the Sixth Circuit's ruling in *Stroble* and in each case, despite the split of authority, this Court consistently denied petitions for review. Since the petitioner has demonstrated no reason, other than those present in the aforementioned cases, the respondent respectfully suggests that certiorari be denied.

II.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS NOT ERRONEOUS.

As stated above, since the respondent, the Commonwealth of Pennsylvania, sought the return of the petitioner to its jurisdiction under the IAD, the "speedy trial" provisions of Article IV and Article VI became applicable. Article IV(c) states, in relevant part:

> [I]n respect to any proceeding made possible by this article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter my grant any necessary or reasonable continuance.

In computing the time restrictions of Article IV(c), Article VI(a) of the IAD mandates:

> [I]n determining the duration and expiration dates of the time periods provided in Article III and Article IV of this Agreement, the running of said time periods ***shall be tolled*** whenever and for as

> long as the prisoner is ***unable to stand trial***, as determined by the court having jurisdiction of the matter.

(Emphasis supplied).

The decision of the Pennsylvania Supreme Court finding that the IAD time clock is tolled by the filing of pretrial motions by a defendant is in accord with numerous decisions both from other state courts as well as federal circuit courts of appeal.[5] Moreover, it is likewise clear that the Pennsylvania Supreme Court's decision is not at odds with the plain meaning and legislative history of the IAD. The IAD nowhere addresses the impact of a prisoner's filing of pretrial motions on the timing provisions of Article VI(c) nor does it specifically define the meaning of "unable to stand trial" as used in Article VI(a). As such, it is sensible for courts to interpret the IAD's timing provisions in a manner consistent with other "speedy trial" provisions so as to promote congruity and fairness among litigants and the courts.

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5. *See Commonwealth v. Thompson*, 495 A.2d 560 (Pa. Super. 1985) (where defendant subject to IAD time limits filed motion to dismiss under Pa. R. Crim. P. 1100 (speedy trial rule) time was tolled because defendant caused delay); *People v. Leonard*, 310 N.E.2d 15 (Ill. App. 1974); *Commonwealth v. Baker*, 627 N.E.2d 469 (Mass. App. Ct. 1994); *People v. Torres*, 468 N.Y.S.2d 606 (N.Y. 1983); *Knox v. State*, 848 P.2d 1354 (Wyo. 1993); *Jones v. State*, 813 P.2d 629 (Wyo. 1991); *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Hines*, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989); *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992).

Therefore, since the IAD does not speak to the meaning of the phrase "unable to stand trial", circuit courts of appeal have chosen an interpretation consistent with the federal speedy trial act. Most notably, the Ninth Circuit recently addressed the different standards circuit courts have used to determine whether a prisoner is "unable to stand trial" under Article VI(a) of the IAD. In *United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996), the court examined the Fifth Circuit's decision in *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), and disagreed with the *Birdwell* court's standard for interpreting the meaning of "unable to stand trial".

Specifically, *Collins* found that the standard adopted by the Fifth Circuit was too narrow. *Collins*, 90 F.3d at 1427. In addressing whether "unable to stand trial" should be defined to include only physical or mental incapacity, the court made the following observation:

> [O]ur concern with the Fifth Circuit's analysis is that the IADA specifically addresses mental incapacity — half of the Fifth Circuit's definition of "unable to stand trial". Under the terms of the IADA, the IADA does not apply to persons who are mentally ill. [ ] [IADA] Art. VI(b) ("No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill"). Had the drafters of the IADA wanted to exclude only the physically incapacitated, in addition to the mentally ill, they would have done so explicitly.

Collins, 90 F.3d at 1427.

Moreover, the court declined to adopt the standard utilized by the Seventh and Eighth Circuits known as the "legally or administratively" unavailable standard as it is too broad and provides little guidance to the courts. *Id.* Ultimately, the court adopted the standard utilized by the Pennsylvania Supreme Court and the Second and Fourth Circuits; that is, interpreting the IAD's tolling provisions in a manner consistent with the federal or state speedy trial acts. In arriving at that decision, the court noted that both the federal speedy trial act and the IADA tolling provisions serve the same purposes. *Id.*

Similarly, the Pennsylvania Supreme Court noted:

> [A]lthough this court has not previously addressed tolling requirements in relation to the IAD, we find persuasive the analysis and interpretation of the courts that held the delay occasioned by the defendant is excludable, particularly in light of recent application of speedy trial provisions to IAD cases by Pennsylvania courts. *See e.g.*, *Commonwealth v. Woods*, 663 A.2d 803 (Pa. Super. 1995) (applying speedy trial provisions to the IAD in holding that defendant's continued presence in federal custody constituted a presence in federal custody constitutes an inability to stand trial, thereby tolling the statute). *Cf.*, *Commonwealth v. Riffert*, 549 A.2d 566 (Pa. Super. 1988), *alloc. denied*, 562 A.2d 825 (Pa. 1989) (holding that the speedy trial provision [Pa. R. Crim. P. 1100] is tolled when a defendant's pretrial motion is pending). The *Woods* court determined that the IAD is consistent with the speedy trial provisions of Pa. R. Crim P. 1100. (citation omitted).

Commonwealth v. Montione, 720 A.2d 738, 741 (Pa. 1998). The respondents suggest that the standard applied by the Pennsylvania Supreme Court was not erroneous and fosters the goal of maintaining consistency of interpretation among speedy trial provisions as well as advancing the proposition that a criminal defendant shall not benefit by delay created by him.[6]

Furthermore, the logic employed by both the petitioner and the Fifth Circuit in its *Birdwell* decision is fatally flawed. The *Birdwell* court concluded that since the phrase "unable to stand trial", in its review of pre-IAD law, referred only to mental and physical ability, the phrase in the IAD's tolling provision should be given the same meaning. *Birdwell*, 983 F.2d at 1340-41. However, that conclusion ignores the provision of the IAD which prohibits its applicability to those who are adjudged mentally ill. IAD, Art. VI(b). Clearly, the framers of the IAD had considered the applicability of the Agreement to mentally ill persons and decided that the act, in its entirely, would not be applicable to such persons. If, as petitioner contends, the phrase "unable to stand trial" in Article VI(a) also refers to mental disability, its existence would be mere surplusage — repetitive of Article VI(b)'s mandate. As a result, sound logic and time-honored principles

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6. Justice Nigro, in his concurring opinion, strongly disagreed with the assertion that a finding that the filing of pretrial motions tolls the IAD's time provisions would punish a criminal defendant for exercising his constitutional rights. Justice Nigro correctly observed that since the defendant sought to benefit from filing pretrial motions and such filings create delays to hold otherwise would "[p]lace the keys to the jailhouse door" in a criminal defendant's hands by allowing him to file pretrial motions and at the same time allow the IAD clock to run. *Commonwealth v. Montione*, 720 A.2d 738, 744 (Pa. 1998) (J, Nigro, *concurring*).

of statutory construction dictate that the insertion of the phrase "unable to stand trial" in Article VI(a) was designed to deal with *any* circumstance where a prisoner becomes unable to stand trial, from the filing of pretrial motions to physical ability to be tried.

In sum, the Pennsylvania Supreme Court's interpretation of the phrase "unable to stand trial" as used in Article VI(a) of the IAD, is in accord not only with decisions of other state jurisdictions but also with six (6) separate federal circuits which have passed upon the issue. Moreover, the interpretation is strongly supported by the very provisions of the IAD as well as the public policy desire to maintain consistent interpretation of similar statutes and, as a result, the Pennsylvania Supreme Court's decision was not erroneous.

III.

THE QUESTION DOES NOT PRESENT AN ISSUE OF SUCH IMPORTANCE OR SIGNIFICANCE TO REQUIRE THE GRANT OF THE WRIT.

Though an off-balanced conflict of authority exists within the United States Circuit Courts of Appeal as well as state appellate courts, the importance of the question presented is overstated by the petitioner. As mentioned earlier, seven (7) circuits have interpreted the meaning of the phrase "unable to stand trial" since the *Stroble* decision by the Sixth circuit in 1978. Six of seven circuits reviewing the phrase has expressly refused to adopt the rationale of *Stroble* and each of the (6) circuits has indicated their preference to define "unable to stand trial" as encompassing periods of delay occasioned by a prisoner's filing of pretrial motions.

Therefore, the consistent interpretation of Article VI(a)'s tolling provision strongly mitigates the importance of the question presented and, as such, the petition for certiorari should be denied.

CONCLUSION

WHEREORE, based upon the forgoing, the Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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